

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

2002 Biennial Regulatory Review --)	MB Docket No. 02-277
Review of the Commission's Broadcast)	
Ownership Rules and Other Rules)	
Adopted Pursuant to Section 202 of)	
the Telecommunications Act of 1996)	
)	
Cross-Ownership of Broadcast)	MM Docket No. 01-235
Stations and Newspapers)	
)	
Rules and Policies Concerning)	MM Docket No. 01-317
Multiple Ownership of Radio)	
Broadcast Stations in Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244

TO THE COMMISSION

**MOTION FOR REVISION OF PROCEDURAL DATES,
EXPANSION OF THE SCOPE OF THE PROCEEDING, AND
INCLUSION OF ADDITIONAL STUDIES IN THE RECORD**

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Summary and Introduction

The Minority Media and Telecommunications Council ("MMTC") and the National Association of Black Owned Broadcasters ("NABOB") respectfully request the Commission to grant the following relief;^{1/}

1. Extend the comment and reply comment periods in the Omnibus NPRM ^{2/} as follows:

Comments: 120 days rather than 60 days

Reply Comments: 60 days rather than 30 days.

2. Reverse language, buried in a footnote, that purported to change longstanding precedent that holds that the attribution rules are inextricably related to substantive ownership rules; and expressly request comment on the attribution rules;
3. Affirm that minority ownership is a central interest in this or any structural ownership proceeding; and stop insisting that commenters debate whether minority ownership is important -- an issue the D.C. Circuit decided 27 years ago and one that is no longer a subject of reasonable debate; and
4. Include in the record of this docket the five broadcast-related research studies released in 2000 pursuant to Section 257 of the Telecommunications Act, and seek comment on these studies.

These steps will produce a superior factual record, reduce substantially the likelihood of judicial dissatisfaction, and go a

^{1/} The views expressed in this Motion are the institutional views of MMTC and NABOB, and do not necessarily reflect the individual views of each of their respective officers, directors, advisors or members.

^{2/} Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (NPRM), FCC 02-249 (released September 23, 2002) ("Omnibus NPRM").

long way toward ensuring an equitable outcome that protects the American people from undemocratic practices by the most important industries in the public sphere.

I. **The Time Allowed For Public Comment Is So So Short That It Ensures That The Record Will Contain Little That Is New Or Creative**

We are not seeking 120 and 60 day comment and reply comment periods in the hope of getting a few extra weeks of additional time. We really mean, urgently, that we need it.

The Omnibus NPRM contains 179 specific questions commenters are expected to answer. Commenters are asked to conduct independent research to answer these questions.^{3/} While many of these questions are quite welcome,^{4/} several key questions germane to the proceeding are not asked in the Omnibus NPRM, and must therefore be raised and developed by commenters like ourselves.^{5/}

3/ Id. at 14 ¶32 ("[w]e welcome the submission of any relevant empirical studies for quantifying benefits and harms, as well as comments based on well-established economic theory and empirical evidence. In that regard, we are especially interested in receiving comments that provide not only the theoretical justifications for adopting a particular regulatory framework, but also empirical data on the effect that: competition and consolidation in the media industry have on our policy goals.")

4/ We note with approval that the Commission has acknowledged the issue of minority ownership. Id. at 19 ¶50 and ns. 122-123. This is a vast improvement on the notice of proposed rulemaking in the local radio ownership proceeding, which did not even contain the words "minority ownership." See Multiple Ownership of Radio Broadcast Stations in Local W e t s (NPRM), 16 FCC Rcd 19861 (2001) ("Local Radio Ownership NPRM"). However, as we discuss herein, the Omnibus NPRM is unfaithful to the Commission's historic regard for minority ownership, and its treatment of the minority ownership issue will ensure that if the parties establish a need for comprehensive review of this issue, such review will be impossible because the proceeding will be over by then. See pp. 9-13 infra.

5/ For example, the Omnibus NPRM does not seek comment on the impact of additional media (and especially cross-media) interests on the attribution rules. See pp. 6-9 infra.

The coordinator of the twelve FCC studies in the record of this proceeding certainly did a yeoman's job. He has stated with great candor that "[w]e have not yet begun to understand the implications [of the studies]....People who feel the outcomes are inaccurate or biased should supply with better, more compelling analyses."^{6/} But in sixty days?

~~We~~ are not without hesitation in seeking additional time, With minority radio ownership in danger and minority television ownership at risk of collapsing entirely, we do not want to delay any relief that could rescue minority broadcasters from the adverse consequences of the 1996 Telecommunications Act and the rules implementing it.

MMTC and NABOB each intend to file useful, thorough and well informed comments. And the plain fact is that if we worked eighty hours per week every week for sixty days on nothing else but this proceeding, we would not be able to write thorough comments. In sixty days, not only would we be unable to conduct any empirical research, we would be unable even to get any research funded or designed. ~~We~~ cannot digest, much less answer, 179 questions in sixty days. No one can

Often, extensions of time to file comments have the effect of delaying the issuance of orders which attain finality. In this instance, an extension of time is likely to accelerate finality, for three reasons.

^{6/} Bill McConnell, "Critics: FCC stacks dereg deck," Broadcasting & Cable, October 7, 2002.

First, poor factual records lead to poor rules, which lead to remands and vacatur. Indeed, the Commission finds itself in the fix that led to the Omnibus NPRM because it did not have good record evidence to support some of its longstanding regulations.

Second, short comment periods bring out the worst in commenters. With the clock staring at them, most parties can do little more than preserve their traditional positions by rehashing their most hard line views.

Third, short turnaround times deprive the parties of any breathing room for the contemplation and mutual consultations that can narrow the issues and generate creative solutions to seemingly intractable problems.^{1/}

Even if longer public comment periods wind up lengthening this proceeding slightly, the Republic will not fall. No national emergency requires the Commission to adopt new rules immediately.

Furthermore, better comments mean better rules. Just as the premature birth of a child seldom contributes to the child's subsequent development, the premature birth of these rules is unlikely to bring about a robust and healthy mass media environment. The stakes are simply too great to rush to judgment.

^{1/} For our part, we would like to invite the major stakeholders to convene on neutral ground in the next several weeks to discuss (a) what issues we can all agree upon; (b) what research studies we should jointly sponsor in order to conserve resources; and (c) whether there are any ways in which relaxations to any of the rules can be designed in a manner that will lead to more minority ownership. However, faced with a sixty day time limit, we cannot realistically organize any such dialogue.

Short time fuses tend to enhance the huge firepower and resource advantages held by the largest companies and the largest trade organizations. Forced to the wall, the networks, the large newspaper publishers, the large cable companies and the large station groups can marshall the resources to file meaningful comments. MMTC, NABOB, and organizations representing listeners and viewers can't do that, however. For example, in the radio ownership proceeding, MMTC and NABOB each filed very extensive comments; MMTC actually filed the most extensive comments in the proceeding. Yet that proceeding involved only one-sixth the scope of this proceeding, and we had exactly the same number of days in which to file our comments as the number of days proposed in the Omnibus NPRM. Here, we are faced with six times as much work and the task of ensuring that the standards used to analyze each set of rules are harmonious with the standards used to analyze the other sets of rules. Asking for twice as much time to do more than six times as much work is not unreasonable.

~~We~~ take the Commission at its word that it has not prejudged the issues and is not simply going through the motions of seeking public comment. Yet the paradigms and basic assumptions underlying these rules have been in effect for two generations or more, and reconsidering them will take some contemplation and thorough analysis. The Commission itself required over six months to cobble these issues together in a notice of proposed rulemaking. ~~We~~ are not seeking nearly as much time as the agency itself required.

For these reasons, the Commission should extend the comment and reply comment dates to 120 and 60 days, respectively.

11. The Commission Should Correct The Omnibus NPRM's Astonishing Footnote 13, Which Contradicts The FCC's Longstanding Recognition That The Ownership And Attribution Rules Are Inextricably Linked

In a proceeding aimed at ensuring that one industry does not dominate another, and that one company does not dominate others, nothing could be more germane than the attribution rules. Yet to our profound surprise, the Omnibus NPRM does not seek comment on the interrelationships between additional media and cross-media interests and the standards used to determine when one company influences another one. Specifically, the Omnibus NPRM states that the attribution rules "do not themselves prohibit or restrict ownership of interests in any entity, but rather determine what interests are cognizable under those ownership rules...[the attribution level] is not related to any changes in competitive forces,"^{8/}

This pronouncement -- buried in a footnote -- is a 180 degree about-face on one of the most fundamental principles of modern structural ownership regulation. The Commission has long regarded the attribution rules as inextricably intertwined with the substantive ownership rules.^{9/} Beginning in 1995, the Commission

^{8/} Id. at 4 n. 13.

^{9/} See, e.g., Attribution of Broadcast and Cable/MDS Interests (R&O), 14 FCC Rcd 12559, 12560 §1 (1999) (attribution rules "seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions....The new attribution rules we adopt today are integrally related to the rules adopted in our companion local television ownership and national television ownership proceedings. A reasonable and precise definition of what interests should be counted in applying the multiple ownership rules is a critical element in assuring that those rules operate to promote the goals they were designed to achieve.")

actually reviewed its broadcast ownership and attribution rules in tandem.^{10/} Indeed, some attribution rules are really substantive ownership rules,^{11/} and some substantive ownership rules are really attribution rules.^{12/}

Attribution rules are written by taking account of the degree of influence one company can exercise over another company in which it holds a noncontrolling interest. Self-evidently, a company permitted by new ownership rules to occupy the dominant position in a market may have far greater ability and incentive to exercise undue influence over other companies; and smaller companies in the market may have greater need and incentive to allow themselves to be influenced by the larger company in order to survive. It follows that the continued efficacy of the test used to measure and constrain attributable interests must be reviewed at the same time

^{10/} See Review of the Commission's Regulations Governing Television Broadcasting (Further NPRM), 10 FCC Rcd 3524 (1995) and Review of the Commission's Regulations Governing Attribution of Broadcast Interests (NPRM), 10 FCC Rcd 3606 (1995). Comments in each of these simultaneously-issued and crossreferenced proceeding were due on the same day, April 17, 1995. These rulemaking notices were also issued on the same day as, and crossreferenced with, Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities (NPRM), 10 FCC Rcd 2788 (1995), but that proceeding has dropped by the wayside. See discussion at pp. 9-13 *infra*.

^{11/} The EDP (equity-debt-plus) rule, while technically an attribution rule, is really a substantive ownership rule.

^{12/} The rules governing LMAs, TBAs and JSAs are attribution rules clothed as substantive ownership rules. It is virtually impossible to consider the impact of LMAs, TBAs and JSAs in connection with local or national television and radio ownership caps without considering the conditions under which these interests are to be attributed.

that the ownership limits are considered for a possible increased -- just as a highway department must review speed limits, stopping distances, and the placement of traffic signals when automobiles and trucks become larger and faster. Thus, the time at which the Commission is simultaneously examining nearly all of the ownership rules presents as never before an urgent need to harmonize the rules with attribution standards.

This proceeding is being undertaken in great measure because the Commission failed to harmonize one set of rules with another, interrelated set of rules.^{13/} It would be ironic and unfortunate if the Commission made the very same mistake again by failing to consider the attribution rules at the same time as it considers the ownership rules.

Finally, even assuming for the sake of argument that the Commission could arbitrarily hold attribution standards fixed while it examines ownership standards, such a course of action would be unwise. In this proceeding, many of the parties' positions on the substantive ownership rules are likely to be polar opposites. Consequently, the Commission needs every measure of flexibility, every adjustable input, every tool, device and variable available to craft a set of rules that proves equitable and sustainable. By including attribution standards in the mix, the Commission would enhance its own ability to harmonize the parties' sharply different positions.. That is what the Commission did in 1999 when it created

^{13/} See Sinclair Broadcast Group Inc. v. FCC, 284 F.3d 148, 162-165 (D.C. Cir. 2002), ~~rehearing denied~~, ___ F.3d ___ (August 12, 2002) ("Sinclair").

the EDP rule, and while that rule is far from perfect, the ability to consider this kind of approach may help save the rules in a court of appeals.

III. The Commission **Should Reaffirm That
Minority Ownership Is Central To
~~Any Structural Ownership Rulemaking~~**

Last year's radio ownership proceeding notice of proposed rulemaking did not even contain the words "minority ownership."^{14/} The Omnibus NPRM is a major improvement: the Commission set out in detail in the Omnibus NPRM much of the relevant history of its minority ownership policies.^{15/} The Omnibus NPRM then stated:

In addition to seeking to foster [diversity, competition and localism], the Commission has historically used the ownership rules to foster ownership by diverse groups, such as minorities, women and small businesses. In the context of this comprehensive review of our ownership rules, we invite comment on whether we should consider such diverse ownership as a goal in this proceeding. If **so**, how should we accommodate or seek to foster that goal? In addition, we invite comment as to our legal authority to adopt measures to foster that goal. ^{16/}

Unfortunately, this language is unfaithful to the Commission's historic regard for minority ownership. It asks the public whether minority ownership should be "a goal" in this proceeding. Such a question is akin to the Department of Education, two generations

^{14/} See Local Radio Ownership NPRM, *supra*. To its credit, though, the Bureau subsequently invited public comment. See Letter to David Honig from Roy Stewart, Esq., Chief, Mass Media Bureau, March 8, 2001 (attached as Exhibit 3 to Comments of MMTC in MM Docket No. 01-317 (filed March 19, 2002)).

^{15/} Omnibus NPRM at 19 ns. 122 and 123.

^{16/} Id. at ¶50 (footnotes omitted).

after 1954, asking whether desegregation should be "a goal" of federal aid to education.

Since at least 1975, it has been a closed question that that minority ownership is a *central* goal in the Commission's structural ownership rules,^{17/} Nothing has happened over the past two decades that called into question whether minority ownership is still a central goal of structural regulation -- much less anything that would require the Commission to start all over and ask whether minority ownership even should be "a" goal.

Certainly Adarand happened.^{18/} But the fact that reasonable people may debate the means by which minority ownership is achieved does not detract from the centrality of the goal itself.

^{17/} See Garrett v. FCC, 513 F.2d 1056, 1063 (D.C. Cir. 1975) (requiring Commission to consider minority ownership in connection with AM nighttime coverage rules; Clear Channel Broadcastina in the AM Broadcast Band, 78 F.C.C.2d 1345, 1368-69 (1980), repealed on other grounds, 102 F.C.C.2d 548, 558 (1984), recon. denied, 4 FCC Rcd 5218 (1989) (establishing minority ownership as a criterion for acceptance of certain applications for new service on the domestic Class I-A clear channels).

^{18/} Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) ("Adarand"). In its footnote citing Adarand, the Commission unfortunately also cites MD/DC/DE Broadcasters Ass'n. v. FCC, 236 F.3d 13, rehearing denied, 253 F.3d 732 (D.C. Cir. 2001), cert denied, 122 S.Ct. 920 (2002) and Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, rehearing denied, 154 F.3d 487, rehearing en band denied, 154 F.3d 494 (D.C. Cir. 1998). Omnibus NPRM at 19 n. 123. These cases are cited in the Omnibus NPRM as authority for inviting "comment as to our legal authority to adopt measures to foster" minority ownership. Id. at 19 4150. These citations should be stricken from the Omnibus NPRM. The MD/DC/DE Broadcasters and Lutheran Church cases did not call into question the Commission's "authority" to "adopt measures" to promote minority ownership. The implication that these cases reach that far is a profound and unexplained departure from the Commission's positions as expressed in its briefs in those cases in the Court and in its subsequent EEO rulemaking notices and decisions. We are surprised, to say the least, that the Commission at least appears to have changed course so dramatically and with such stealth.

Suppose the record in this proceeding establishes the obvious -- that minority ownership is indeed a central goal *of* the ownership rules. At that point in time -- at the end of the proceeding -- the development of the minority ownership issue would stand where the development of the diversity, competition and localism issues stand today -- at the beginning of the proceeding. The Commission has already decided that diversity, competition and localism are central goals, and during this proceeding the public will develop a record showing how these goals can be achieved. As to minority ownership, all the record will show is that it is important, and that there are no constitutional impediments to achieving this goal. The record will not contain anything regarding how the goal of minority ownership is to be achieved, because the Commission has not asked for comment on that subject.^{19/}

Thus, the Commission has placed minority ownership outside the doorstep of the proceeding, where it must knock and beg to be let in. Even if at the conclusion of this proceeding the Commission concludes that minority ownership is a central goal,

^{19/} In contrast to its cursory treatment of minority ownership, the Omnibus NPRM contains superb and very extensive analyses of the impact of the various rules on diversity (id. at 14-19 ¶¶33-50, 27-29 ¶¶78-83, 34-35 ¶¶102, 43-45 ¶¶132-137, and 51-52 ¶¶160-163), competition (id. at 19-24 ¶¶151-68, 29-33 ¶¶84-94, 35-36 ¶¶104-105, 45-48 ¶¶138-146, and 52-53 ¶¶164-167), and localism (id. at 24-25 ¶¶69-71, 33 ¶¶95-97, 35 ¶¶103, 48-49 ¶¶147-154 and 53 ¶¶168).

such a finding will occur too late to lead to changes in the rules, because the proceeding will be over.^{20/}

Suppose, for the sake of argument, the Supreme Court were to hold that race conscious means are absolutely impermissible. Such a finding would still allow the Commission to ask parties to help it develop a record on this question: what is the likely impact on minority ownership of proposed relaxations of some of the rules being examined in this proceeding? The Commission has asked for comment on the impact of possible changes in its rules on diversity, competition and localism. It has not asked how changes in its rules would impact minority ownership.

The unfortunate language in Paragraph 50 of the Omnibus NPRM must have been a lapse of judgment. Regrettably, it was not a momentary lapse, but rather it is part of a pattern of Commission avoidance of minority ownership. Consider this history:

^{20/} That is essentially what happened in 1984, when the Commission adopted new national radio ownership rules that did not seriously consider minority ownership. Multiple Ownership of AM, FM and Television Broadcast Stations (R&O), 100 F.C.C.2d 17 (1984). Thanks to the initiative of the late Congressman Mickey Leland, the Commission added a minority ownership incentive to the rules on reconsideration. Multiple Ownership of AM, FM and Television Broadcast Stations (Reconsideration), 100 F.C.C.2d 74, 94-98 (1984). The "Mickey Leland Rule", a minority ownership bump-up of two stations above the number that otherwise could be held nationally, was only used legitimately by three companies (Ragan Henry's MediaComm National, Bishop Willis' Willis Broadcasting, and Lowell Paxson's Paxson Communications) before the underlying national ownership rule was repealed. The Commission's failure to address minority ownership in the initial proceeding ensured that any consideration of this issue on reconsideration would be, at best, a minor tack-on with little substantive impact.

The Commission adopted minority ownership policies in 1978 when there were only 60 minority owned stations. That number had quintupled by 1995, the year in which Congress repealed the tax certificate policy.

Comparative hearings died with the 1996 Act. No minority enhancement was built into the auction rules because the Commission had not performed any Adarand studies. Further, the Commission decoupled the minority ownership rulemaking docket from its multiple ownership and attribution dockets -- leaving the minority ownership docket dormant to this day.

Pursuant to Section 257, the Commission finished its Adarand studies and published them in 2000, but did not propose any new rules based on them. Both before and after their publication, the Commission promised to include the studies in a review of its ownership policies. Yet twenty-two months after their publication, the Adarand studies are gathering dust, and the Commission has failed even to discuss them in the Omnibus NPRM. See pp. 13-22 infra.

The Commission should correct the Omnibus NPRM's second-class characterization of minority ownership by changing the language of Paragraph 50 so that instead of asking "whether we should consider such diverse ownership as a goal in this proceeding" the paragraph would state "we consider fostering minority ownership to be a central interest in this proceeding." Finally, the Commission should ask, with respect to each of the six rules covered in this docket, how the rule is likely to impact minority ownership and how minority ownership is likely to impact the Commission's other central goals of diversity, competition and localism.

IV. The Commission Should Place Its Section 257 Studies In The Record Of This Proceeding

In an historic public hearing held December 12, 2000, the Commission released five broadcast-related studies in which it measured the impact of its regulatory policies on minority ownership in the broadcasting and wireless industries. These studies, and their key findings, were:

1. When Being Number One Is Not Enough: The Impact of Advertising Practices On Minority-Owned And Minority-Formatted Broadcast Stations, Kofi Ofori, Civil Rights Forum on Communications Policy (1999)

This study examined discriminatory advertising practices and their impact on minority owned and minority formatted broadcasters. Its central finding was that radio stations that are successful in attracting large minority audiences still do not attract the dollars their ratings should earn. Anecdotal data collected by the study suggested that, in some instances, the media buying process is influenced by stereotypical perceptions of minorities, presumptions about minority disposable income, a desire to control product image and unfounded fears of pilferage.^{21/}

2. Diversity Of Programming In The Broadcast Spectrum: Is There A Link Between Owner Race Or Ethnicity And News And Public Affairs Programming? Christine Bachen, Allen Hammond, Laurie Mason and Stephanie Craft, Santa Clara University School of Law (2000)

This study found that minority owned radio stations aired more racially diverse programming than did majority owned stations. Minority owned radio stations were significantly more

^{21/} The study identified two particularly egregious practices: "no urban/Hispanic dictates" (an advertiser's instructions to its agency to refuse to buy airtime on stations with Black or Spanish formats) and "minority discounts" (an advertiser's refusal to pay as much to reach minority audiences as it would pay to reach white audiences, other factors being equal). A followup regression analysis (not part of the Commission's Section 257 process), *Minority Targeted Programming: An Examination Of Its Effect On Radio Station Advertising Performance*, Kofi Ofori (January, 2001), found that advertisers paid less for time on stations owned by minorities (especially standalone stations), stations having minority formats, and stations targeted to young audiences. These factors appeared to be a proxy for "no urban/Hispanic dictates" and "minority discounts."

likely than majority owned stations to broadcast programming about women's issues and live coverage of government meetings. They were also more likely to have a minority format for their music programming. Minority owned television stations were significantly more likely than their majority owned counterparts to have current events related programming and issues relevant to senior citizens.

Furthermore, radio stations and television stations with more minorities on their staffs had more racially diverse programming than comparable stations with few minority employees. Owner involvement, ownership structure, and station revenue were not predictors of programming diversity.

**3. Study Of The Broadcast Licensing Process, KPMG LLP
Economic Consulting Services (2000)**

This study included three parts: (1) History of the Broadcast Licensing Process; (2) Utilization Rates, Win Rates, and Disparity Ratios for Broadcast Licenses Awarded by the FCC; and (3) Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC.

The study examined minority broadcast ownership during a period when the Commission sometimes awarded credit for minority ownership. It concluded that a dollar of assets in an application with minority presence was treated more favorably than a dollar of assets generally, while a dollar of liabilities had a more adverse impact on the probability of a win for an application with minority presence than for an application with lesser minority involvement.

KPMG also found that minority participation in comparative hearings was very low relative to minority representation in the

U.S. population. The comparative hearing process seemed to have awarded credit for minority participation, as the Commission had intended. Nonetheless, there was actually a lower overall probability for an application with minority ownership winning a license than a nonminority application after controlling for a variety of important variables. This occurred because minority applicants were less likely to be "singletons", i.e., applications unopposed by mutually exclusive applicants.

The study also concluded that during the time of the Commission's policy of awarding credit for ownership by women, there was a positive and significant relationship between female ownership -- both by additional numbers of women and by a higher percentage of female ownership -- and the probability of license award. This result suggests that the Commission's policy of awarding credit for ownership by women was more effective than the Commission's policy of awarding credit for minority ownership.

**4. Study Of Access .To Capital Markets And Logistic
Regressions For License Awards By Auctions,
William Bradford, University of Washington (2000)**

Using regression analysis, Dr. Bradford examined the capital market experiences of current broadcast license holders with respect to race, gender, the year of application or acquisition, business cash flow, equity, and size of firm (full time employees). His study found that minority broadcast license holders were less likely to be accepted in their applications for debt financing, after controlling for the effect of the other variables on the lending decision. Minority borrowers paid higher interest rates on their loans, after controlling for the impact of the other

variables. Gender did not seem to affect the interest paid by borrowers.^{22/}

Dr. Bradford also concluded that minority status resulted in a lower probability of winning in spectrum auctions. The data showed that gender has a similar, but less pronounced negative impact on winning spectrum auctions.

5. Whose Spectrum Is It Anyway? Historical Study Of Market Entry Barriers, Discrimination And Changes In Broadcast And Wireless Licensing - 1950 To Present, Ivy Planning Group (2000)

The Ivy Planning Group interviewed 120 representatives of small, minority and women owned businesses that had attempted (successfully or not) to acquire, sell or transfer a license during the years 1950 - 2000. The researchers also interviewed 30 key market participants, including media brokers, lenders, attorneys, industry leaders, and FCC officials. The consensus of the interviewees was that for minority and women licensees, market entry barriers were exacerbated by the discrimination minorities and women have faced in the capital markets, in the advertising industry, in broadcast industry employment, in the broadcast station transactional marketplace, and as a consequence of various actions and inactions by the Commission and Congress. Further, the study concluded that market entry barriers have been aggravated by weak enforcement of FCC EEO regulations, underutilized FCC minority incentive policies, use by nonminority men of minority and female

^{22/} These findings bear a close similarity to the Commission's 1982 conclusion that access to capital was the number one market entry barrier facing minorities. See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849, 852-53 (1982).

"fronts" during the comparative hearing process, the lifting of the broadcast ownership caps, and minimal small business advocacy before the Commission. Congress' repeal of the tax certificate program, which from 1978 until its repeal in 1995 provided tax incentives to encourage firms to sell broadcast licenses to minority owned firms, was regarded by interviewees as a particularly severe blow to minorities' ability to acquire broadcast and cable properties.^{23/}

The Ivy Planning Group concluded that (1) bidding credits designed to increase the opportunities for participation in wireless auctions by small, minority and women owned businesses were ineffective and unsuccessful; (2) the relaxation of ownership caps has significantly decreased the number of small, women and minority owned businesses in the broadcasting industry; (3) the declining participation of small, women and minority owned businesses in broadcasting has resulted in diminished community service and diversity of viewpoints; and (4) the Commission had often failed in its role of public trustee of the broadcast and wireless spectrum by not properly taking into account the effect of its programs on small, minority and women owned businesses.

These five studies were conducted pursuant to 47 U.S.C. §257 (1996), which establishes a "National Policy" under which the Commission shall promote "diversity of media voices, vigorous economic competition, technological advancement and promotion of

^{23/} The tax certificate policy was repealed in Deduction for Health Insurance Costs of Self-Employed Individuals, Pub. L. No. 104-7, §2, 109 Stat. 93, 93-94 (1995) (codified at 26 U.S.C. §1071 (1995)).

the public interest, convenience and necessity,"^{24/} Section 251 was drafted with the promotion of minority ownership in mind.^{25/}

The importance of sound research in this record has been emphasized by the Commission's decision to start the comment clock on the date the Commission released twelve studies concerning its ownership rules. That fact alone makes it astonishing that nowhere in the 55 page, 181 paragraph Omnibus NPBM are the Commission's five broadcast-related Section 257 studies analyzed.

It is even more astonishing that these studies are not discussed in the Omnibus NPRM even though the Commission expressly promised to review these studies in connection with ownership rule review:

^{24/} 47 U.S.C. §257(b).

^{25/} Congresswoman Cardiss Collins, a sponsor of Section 257, offered this interpretation of the Section:

[W]hile we should all look forward to the opportunities presented by new, emerging technologies, we cannot disregard the lessons of the past and the hurdles we still face in making certain that everyone in America benefits equally from our country's maiden voyage into cyberspace. I refer to the well-documented fact that minority and women-owned small businesses continue to be extremely underrepresented in the telecommunications field....Underlying [Section 257] is the obvious fact that diversity of ownership remains a key to the competitiveness of the U.S. communications marketplace.

142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (statement of Rep. Collins).

We note that a number of parties have expressed concern about the fact that greater consolidation of ownership in broadcasting makes it more difficult for new entrants -- parties that own no or only a few mass media outlets -- to enter this industry. This is particularly the case for minorities and women who are underrepresented in broadcasting. We share these concerns. The Commission has recognized the importance of promoting new entry into the broadcast industry as a means of promoting competition and diversity. Indeed, we have adopted a "new entrant" bidding credit as part of our broadcast auction procedures for these reasons and also to comply with our statutory mandate to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." We will monitor the effects of the relaxation of our local TV ownership rules on new entry.

We are now guided in considering initiatives to encourage greater minority and women-owned mass media businesses by a 1995 Supreme Court decision that held that any federal program that uses racial or ethnic criteria as a basis for decision-making is subject to strict judicial scrutiny. . . .

We are presently conducting studies that we believe will allow us to address this issue in the context of our broadcast licensing and ownership policies. Upon the completion of these studies, we will examine the steps we can take to expand opportunities for minorities and women to enter the broadcast industry. In the interim, we encourage broadcasters to establish incubator programs and to engage in other cooperative ventures that will boost new entry into the broadcast industry, particularly with regard to participation of women and minor' ' in the mass media. 26/

26/ Review of the Commission's Rules Governing Television Broadcasting (R&O), 14 FCC Rcd 12903, 12909-10 ¶¶13-14 (1999) (emphasis supplied) ("Television Broadcasting") (fns. omitted).

After the studies were released, the Commission again affirmed that "[w]hile we are concerned about minority ownership, we believe...initiatives to enhance minority ownership should await the evaluation of various studies sponsored by the Commission."27/

Unfortunately, the Commission seems to have broken these promises. It has not announced any review of the Section 257 studies. **And** on top of that, it has now issued an omnibus rulemaking notice that fails even to discuss the Section 257 studies.28/

Unlike some critics of the Omnibus NPRM, we do not cast doubt on the integrity of the twelve studies the Commission did place in the record. We know many of the scholars who performed the studies, and we assume that their research was conducted with objectivity and integrity. Our objection is only to the omission from the record of the other five recent Commission-sponsored studies that are germane to this proceeding.

27/ Review of the Commission's Rules Governing Television Broadcasting (Reconsideration), 16 FCC Rcd 1067, 1078 4133 (2001) (fn. omitted) (reversed in part on other grounds in Sinclair). This ruling came in response to MMTC's petition for reconsideration of Television Broadcasting. MMTC predicted that that these rules would cut the number **of** minority owned television stations in half in three years. MMTC, Petition for Partial Reconsideration and Clarification, MM Docket No. 91-1221 (filed October 18, 1999), p. ii. Approximately as MMTC predicted, the number of minority owned television stations has declined from 33 in 1999 to 20 today.

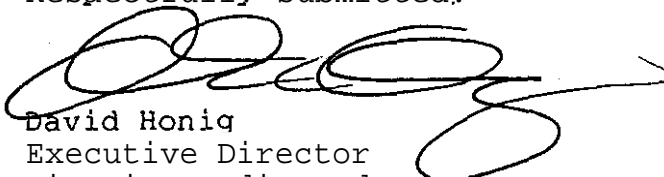
28/ A press release announcing the studies is cited for the ministerial purpose of reciting the existence of the tax certificate policy. Omnibus NPRM at 19 n. 122.

Many members of the public may not be aware of the five broadcast-related Section 251 studies. To help ensure that members of the public file comments on these Section 251 studies, we move their inclusion in the record, and we ask the Commission expressly to encourage all parties to comment on their findings and implications.

Conclusion

Given the supreme importance of the issues in this proceeding, we encourage the Commission to call in all stakeholders for intensive consultations and, where appropriate, amend or clarify the Omnibus NPRM so that all concerned will regard it as fair, objective and complete. **As a** first step, the Commission should issue a revision and clarification that grants the relief requested herein.

Respectfully submitted.



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